

NOTICE  
Decision filed 07/10/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 140615-U

NO. 5-14-0615

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 10-CF-781
	)	
TERRY L. CHRISTOFF,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defense counsel failed to address each claim asserted by the defendant's *pro se* postconviction petition in a motion to withdraw, and where the trial court denied the postconviction petition *sua sponte*, the orders of the circuit court of Jackson County are reversed and the case is remanded for further second-stage postconviction proceedings consistent with this order, including the appointment of new counsel.

¶ 2 The issue is whether the circuit court of Jackson County erred in granting appointed postconviction counsel's motion to withdraw and dismissing the defendant's postconviction petition. For the foregoing reasons, we hold that it did.

¶ 3

## I. BACKGROUND

¶ 4 This court's order on direct appeal sets forth a detailed and thorough account of the factual history of this case. See *People v. Christoff*, 2013 IL App (5th) 110482-U. Therefore, we will only set forth the procedural facts relevant to this appeal.

¶ 5 The defendant was convicted of two counts of predatory criminal sexual assault and two counts of aggravated criminal sexual abuse. On direct appeal, this court found that the defendant was proven guilty beyond a reasonable doubt on all four counts. This court further held that the imposition of concurrent sentences of imprisonment and the trial court's imposition of a 10-year term of mandatory supervised release was improper. On remand, the defendant was resentenced to a term of 18 years.

¶ 6 On October 6, 2013, the defendant filed a *pro se* postconviction petition in which he asserted 22 allegations of various deprivations of his constitutional rights. On November 1, 2013, counsel was appointed, and the petition advanced to the second stage. On November 24, 2014, appointed postconviction counsel filed a motion to withdraw. Attached to the motion was a sworn affidavit from counsel stating why claims 1, 2, 4 through 14, and 17 through 22 in the *pro se* petition were patently without merit. The affidavit failed to address the defendant's three other allegations contained in the *pro se* petition. On December 2, 2014, the court granted the motion and *sua sponte* dismissed the defendant's postconviction petition. The defendant appealed.

¶ 7

## II. ANALYSIS

¶ 8

### A. Motion to Withdraw as Counsel

¶ 9 We first note that *People v. Kuehner*, 2015 IL 117695, is retroactively applicable to this case. The Illinois Supreme Court has determined that "decisions apply to all cases that are pending when the decision is announced, unless this court directs otherwise." (Internal quotation marks omitted.) *People v. Price*, 2016 IL 118613, ¶ 27. With regard to cases on collateral review, this rule is applicable unless *Teague v. Lane*, 489 U.S. 288 (1989), applies. As *Kuehner* would have had no impact on the defendant's case before his conviction was final, *Teague* is not applicable, and we move forward under a *Kuehner* analysis.

¶ 10 In *Kuehner*, the Illinois Supreme Court found that if a postconviction petition reaches the second stage through affirmative judicial determination, then "when filing such a motion [to withdraw], appointed counsel owes the trial court at least some explanation as to why, despite its superficial virtue, the *pro se* petition is *in fact* frivolous or patently without merit, and counsel owes this explanation with respect to each of the defendant's *pro se* claims." (Emphasis in original.) *Kuehner*, 2015 IL 117695, ¶ 21. In these cases, counsel bears the burden of explaining to the court, with respect to each claim, why its initial assessment was incorrect. *Id.* "[W]here appointed counsel is either unable or unwilling to make that case with respect to each of the *pro se* claims contained in the petition, appointed counsel's motion to withdraw must be denied." *Id.* ¶ 22.

¶ 11 In this case, as conceded by the State, the motion filed by defense counsel failed to meet this standard. Counsel's motion failed to address three claims raised by the

defendant in his *pro se* petition. Therefore, we reverse the trial court's order granting appointed counsel's motion to withdraw.

¶ 12 B. *Sua Sponte* Dismissal of a Second-Stage Postconviction Petition

¶ 13 Once a postconviction petition reaches the second stage under subsection 122-2.1(b) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(b) (West 2014)), "the State shall answer or move to dismiss." *Id.* § 122-5.

¶ 14 "It is improper for a trial court to dismiss a postconviction petition simply because postconviction counsel has been allowed to withdraw as counsel. [Citations.] 'The fact that counsel has been granted leave to withdraw does not mean that the postconviction petition is dismissed. [Citation.] Instead, the State must file a motion to dismiss the petition.'" *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 18 (citing *People v. Greer*, 341 Ill. App. 3d 906, 910 (2003)).

¶ 15 As the State concedes, the trial court's *sua sponte* dismissal of a second-stage postconviction petition was improper.

¶ 16 III. CONCLUSION

¶ 17 Therefore, we reverse the orders of the circuit court of Jackson County and remand the cause for further proceedings consistent with this order, including the appointment of new postconviction counsel.

¶ 18 Reversed and remanded.